IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision :21-2-2007

**Surender @ Sunder Vs State of Haryana**

CORAM: **Hon'ble Mr. Justice Virender Singh**

Present: Mr. Rahul Vats, Advocate, for the appellant.
Mr. Dinesh Arora, AAG, Haryana.

**Virender Singh, J.**

At the very out-set, It may be mentioned that along with the appellant one Narender alias Mota son of Satbir Singh resident of village Moth Karnail was also booked in the present case for having in his conscious possession 4 Kgs 400 grams of charas, as both were apprehended at the same place and same time (i.e. 20-8-2000 at 9-00 PM). The prosecution agency has, however, registered one case only against both of them bearing FIR No. 201 dated 20-8-2000, at police station Narnaund, under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1988 (for short the `Act'). Aforesaid Narender alias Mota also stands convicted under Section 20 of the Act vide separate judgment of learned Additional Sessions Judge, Hisar dated 15/17-9-2001 and has been awarded the same sentence. He has preferred his separate appeal ( bearing Criminal Appeal No. 114-SB of 2002), which also stands disposed of vide my separate judgment of even date.

Surender alias Sunder son of Nardev Singh, resident of village

Moth Karnail, District Hisar ( appellant-herein) stands convicted under Section 20 of the Act for keeping in his possession 4Kgs of charas vide impugned judgment of learned Additional Sessions Judge, Hisar dated 15/17-9-2001. He has been sentenced to undergo RI for ten years and to pay a fine of Rs. one lac, in default thereof to further undergo RI for one year.

Briefly, the case of the prosecution is that on 20-8-2000 at about 9-00/9-15 PM, ASI Sohan Singh (PW7), who was posted in CIA staff Hisar along with HC Om Parkash, HC Ram Kumar, UGC Krishan Kumar, Constables Hanuman, Hari Krishan besides other police officials was present at Piaoo Chowk in a government vehicle in connection with general patrolling and crime checking when he got a secret information that the present appellant along with one Narender, who have been indulging in selling of charas, would be going to supply the same in some villages and if nakabandi is laid near the Bus Stand, they could be apprehended. One Ram Mehar was also joined in the police party as a witness. In the meantime the present appellant along with Narender was seen coming from the side of village Moth. Both were having bags in their hands. After seeing the police party, they tried to run away. Both of them were apprehended by ASI Sohan Singh. Notice ( Exhibit PF) was served upon the appellant, vide which he was apprised of his right to get his search conducted in the presence of a gazetted officer or a Magistrate. The said notice was signed by all the police officials and independent witness Ram Mehar. As the appellant consented to be searched before a gazetted officer,

DSP Raj Kumar ( PW8) was called at the spot through VT message and on his direction the thela carried by the appellant was searched. It was found to contain 4 Kgs-400 grams of charas. 50 grams out of it was separated as a sample. The remainder was put in the same bag. It was sealed with the seal of ASI Sohan Singh bearing inscriptions `SS'. DSP Raj Kumar had also put his seal bearing inscriptions `RK' on the remainder and the sample . The DSP had kept his seal with him. The entire case property was taken into possession vide recovery memo. Exhibit PG, which was also attested by the aforesaid witnesses. Ruqqa ( Exhibit PA) was sent, upon which formal FIR ( Exhibit PA/1) was registered at the concerned police station. The site plan was also prepared at the spot. On return to the police station the case property and the appellant was produced before SHO Nihal Singh ( PW1), who verified the investigation and put his own seal bearing inscriptions `NS' on the sample and the remainder. The report ( Exhibit PC) was produced before him, upon which he made his endorsement ( Exhibit PC/1). Thereafter the case property was deposited with MHC Ram Kumar ( PW2). After completion of investigation, the appellant was challaned. He was charged under Section 20 of the Act.

In order to substantiate the charge against the appellant, the prosecution examined the following witnesses:

PW1 Nihal Singh, who was posted as SI/SHO of police station Nanaund on 20-8-2000. He had recorded the formal FIR on receipt of ruqqa. The accused and the case property were produced before him and he had put his own seal on the samples and the remainders.

PW2 HC Ram Kumar had tendered his affidavit Exhibit PD.

PW3 Hawa Singh Constable had tendered his affidavit Exhibit PE.

PW4 SI Jagbir Singh had prepared the final report under Section 173 of the Code of Criminal Procedure.

PW5 ASI Ram Avtar had partly investigated the instant case and had recorded the statements of certain police officials.

PW6 Krishan Kumar, UGC was a witness to the recovery and had also proved the recovery memos prepared at the spot.

PW 7 Sohan Singh was the Investigating Officer, whose investigation has already been alluded to in the preceding paras.

PW 8 Raj Kumar DSP, another witness to recovery had also reiterated the case of the prosecution. He had also signed certain recovery memos prepared at the spot.

Ram Mehar the independent witness was given up as having been won over by the accused.

The plea taken by the appellant as emerges from his statement recorded under Section 313 of the Code of Criminal Procedure was of false implication asserting that he and his co-accused were taken into custody from Bus Stand, Narnaund when some altercation had taken place between them and the driver of the bus. Both of them were taken to the police station where they were given severe bearings. When they protested to make a complaint against the police to the higher authorities, they were falsely implicated in this case.

In his defence, the appellant had produced aforesaid Ram Mehar as DW1, who deposed that nothing was recovered from the appellant and his co-accused in his presence and on 20-8-2000 he had gone to Police Station Narnaund, where both the accused were found sitting and on asking of the police he had signed certain papers. In his cross-examination, this witness admitted that the appellant and Narender were his neighbourers. He further admitted that ASI Sohan Singh had apprehended both the accused in his presence and search was conducted in the presence of DSP Raj Kumar. This witness, however, denied the recovery of any charas from their possession.

After examining the entire evidence, the trial Court convicted and sentenced the appellant, as indicated hereinabove. Hence this appeal.

I have heard Mr. Rahul Vats, learned counsel for the appellant and Mr. Dinesh Arora, learned Assistant Advocate General, Haryana. With their assistance I have carefully perused the entire evidence on record.

Mr. Vats contends that notice given to the appellant under Section 50 of the Act was totally defective because it was conveyed to him and to his co-accused, namely, Narender as to whether they wanted to be searched before a Magistrate or a gazetted officer or they were reposing confidence in the Investigating Officer. According to the learned counsel, this does not amount to a complete compliance strictly in accordance with Section 50 of the Act. On this basic infirmity, the appellant deserves to be acquitted.

The next argument of Mr. Vats is that Ram Mehar the

independent witness joined by the police party did not support the case of the prosecution. Rather he appeared as a defence witness in order to strengthen the plea of the appellant and, therefore, this weakness also dents the case of the prosecution to a great extent.

The learned counsel then submits that the recovery was allegedly effected by ASI Sohan Singh and the case was also investigated by him which is totally impermissible.

The learned counsel while relying upon a decision of Full Bench of this Court rendered in **Kashmir Singh Vs. State of Punjab, 2006 (2) RCR ( Criminal ) 477** submits that no specific question was put to the appellant with regard to the conscious possession of the contraband when his statement under Section 313 of the Code of Criminal Procedure was recorded and, therefore, no presumption under Section 35 or 54 of the Act can be drawn against the appellant.

Attacking the case of the prosecution with regard to link evidence, the learned counsel submits that form No. 29 was neither filled in at the spot, nor it was deposited with MHC of the Malkhana along with the case property and on this score as well the prosecution case stumbles.

The learned counsel next submits that in this case only one sample of 50 grams was drawn whereas as per the rules two samples should have been taken. Furthermore, there is a delay of 7 days in sending the sample to the office of the Chemical Examiner and no explanation has been put forth for this delay.

On the basis of the aforesaid submissions, the learned counsel

prays for acquittal of the appellant.

Opposing the submissions made by Mr. Vats, the learned State counsel contends that Section 50 of the Act is not attracted in this case as it was search of a person and, therefore, the appellant cannot derive any benefit from the weakness, if any. He then submits that even if the independent witness has not supported the prosecution version, the same would not adversely effect its case as the recovery is otherwise proved from the statements of the police officials, including a senior police official of the rank of DSP. Mr. Arora then submits that the other weaknesses as pointed out by the learned counsel for the appellant are not of such a serious nature as to dislodge the case of the prosecution in its totality. According to him, the recovery effected in this case is very heavy and chances of false plantation of the same are ruled out. The appellant, thus, has no escape.

After giving my thoughtful considerations to the rival contentions of either side and minutely going through the entire record , I am of the view that the prosecution has been successful in proving conscious possession of the contraband ( 4 Kgs of charas) qua the appellant beyond any shadow of doubt and, therefore, the conviction as recorded by the learned trial Court deserves to be affirmed. I shall now be entering into detailed discussion meeting almost all the contentions raised by learned counsel for the appellant.

The first limb of argument advanced by Mr. Vats with regard to Section 50 of the Act, carries no weight in the light of a latest judgment of Hon'ble Apex Court in **State of Himachal Pradesh Vs. Pawan Kumar,**

**2005(2)All India Criminal Law Reporter 653** as the appellant was carrying contraband in his hand. It does not amount to a personal search as held in the aforesaid judgment. Therefore, Section 50 of the Act is not attracted in this case. The argument advanced in this regard is, thus, repelled.

The other argument with regard to non-examination of Ram Mehar, the independent witness by the prosecution is again of no advantage to the appellant. No doubt, this witness has been given up by the prosecution as having been won over and was ultimately produced by him in his defence as DW1, yet this would not adversely effect the case of the prosecution. In his cross-examination, this witness has admitted that both the accused were his neighbourers. In this situation, it was not difficult for the appellant to pressurise him to depose in his favour. Rather in his cross-examination, he admits the factum of recovery being conducted in the presence of a DSP. Therefore, even if this witness has not supported the case of the prosecution, the other evidence on record is sufficient to prove the recovery. To be more cautious, I have re-scanned the statements of the official witnesses and find no basic lacunae therein on any vital aspect, so as to disbelieve the prosecution case in its entirety. Therefore, I reject this limb of argument as well.

No doubt, the recovery is effected by ASI Sohan Singh, who himself is the Investigating Officer, but in my view this fact by itself would not be fatal to the prosecution as immediately after receipt of the secret information and apprehending the accused, he informed his senior

police official through VT message. The search was conducted on the direction of DSP Ram Kumar, who had reached the spot after some time and signed the recovery memos as well. The case property was subsequently shown to the SHO of the police station, who in compliance with Section 55 of the Act had verified all the facts and affixed his own seal thereon. The DSP had kept his seal with him. All these facts would be enough to show that even if ASI Sohan Singh himself had investigated the case despite the recovery being effected by him, it would not be fatal to the prosecution. Therefore, I do not find any substance in the argument advanced by Mr.Vats on this count as well.

An attempt made by learned counsel for the appellant to demolish the case of the prosecution on the basis of Full Bench decision rendered by this Court in **Kashmir Singh's case ( supra)** again falls on the ground as the said judgment is not applicable to the facts of the present case.

In the present case the factual position is that the appellant along with another person namely Narender was apprehended by the police. From both of them huge quantity of charas was recovered separately. This particular fact is put to the appellant while recording his statement under Section 313 of the Code of Criminal Procedure. The Division Bench of this Court while dealing with the aspect of presumption to be drawn under Section 35 or 54 of the Act in the light of **Kashmir Singh's case ( supra**) observed in a latest judgment rendered in **Chand Singh Vs. State of Haryana, Criminal Appeal No. 402-DB of 2005** (decided on December 18, 2006) as under: -

"No doubt, the Full Bench of this Court in the operative part of its judgment observed that no presumption under Section 35 or 54 should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement under Section 313 Cr.P.C. by being called upon to explain the circumstances which gave rise to the presumptions. Thereafter the accused should be given an opportunity to lead evidence in defence in support of his stand. However, there is no rule or apparent conflict regarding the correct meaning of "possession" which needs to the resolved.

The present case is not covered by Para 19 of the aforesaid Full Bench judgment of this Court as in this case, the accused were given opportunity to rebut the presumption in their statements under Section 313 of Cr.P.C. The entire evidence as recorded before them indicates that the accused knew about the circumstances under which they are being prosecuted and what defence they had to make. Ultimately, after putting them all the incriminating circumstances appearing against them, they were still given liberty to say anything whatever they desired. They were also called upon to enter into a defence. They also led evidence in defence but it is something different that they did not lead sufficient evidence to rebut the presumption drawn against them. Unlike the pleadings in the civil cases, the Code never

> intended the prosecution should plead specifically with mathematical precision, the benefit of which could be derived by the accused. The circumstances prevailing over the case speak to the volumes that the accused were bringing 75 bags of poppy husk while concealing the same under 95 bags of rice chaff and were caught red handed when the police placed a picket on receipt of the secret information. They failed to explain their possession of the contraband. They did not tell a word at the time or immediately after the recovery was effected orally or in writing that they were not in the knowledge of the contents of the bags placed in the truck. Since the accused were having power and control over the truck and the articles contained therein, therefore, it cannot be said that they were not aware about the contents of the bags. Thus, interference will be drawn that the accused Chand Singh and Sukhpal Singh were in conscious possession of the contraband".

As a sequel to the aforesaid discussion, I am of the view that in the present set of circumstances the appellant cannot derive any advantage from the observations made in **Kashmir Singh's case ( supra)**.

The arguments advanced by Mr.Vats on the point of link evidence are being dealt by me collectively.

No doubt, form No. 29 was neither prepared at the spot, nor deposited with the incharge of the Malkhana, but this cannot be said to be a

serious flaw in each and every case, as it depends upon the facts of each case. In the case in hand, a huge recovery of more than 8 Kgs of charas was effected from two accused on the direction of a senior police official, who himself had signed all the recovery memos. As stated above, I have not found any flaw in the statements of the official witnesses on any material aspect so as to doubt the recovery. Similarly even if there is delay in sending the samples to the office of the Chemical Examiner, the same cannot be considered against the prosecution. Extracting of one sample instead of two, as per instructions, at the most can be said to be irregularity which, in my view, cannot uproot the case of the prosecution. The seals on the samples were found in tact by the official of the Chemical Examiner's office. In my view the link evidence is not missing in this case on any aspect.

No other point has been urged before me by either side.

The net result now surfaces is that the prosecution has been able to prove the charge against the appellant for having in his conscious possession ( 4 Kgs of charas) and, therefore, the conviction and sentence as recorded by the learned trial Court vide the impugned judgment is hereby upheld.

Resultantly the instant appeal is dismissed being without any merit.

**[Virender Singh]**
**Judge**

**February 21, 2007**
**`ask'**